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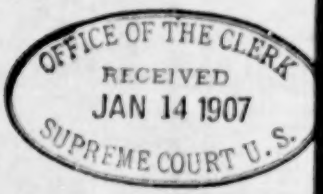

No. 103.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1906.

THE BOARD OF EDUCATION OF THE KENTUCKY ANNUAL CONFERENCE OF THE METHODIST EPISCOPAL CHURCH,
Plaintiff in Error,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error.

} In Error to the Supreme Court of the State of Illinois.

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING WITH STATEMENT OF REASONS IN SUPPORT THEREOF.

CHARLES H. ALDRICH,
LAWRENCE MAXWELL, JR.,
ATTORNEYS FOR PLAINTIFF IN ERROR.

BARNARD & MILLER, PRINTERS, CHICAGO

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Motion for leave to file petition for rehearing, with statement of reasons in support thereof.

Now comes the plaintiff in error and moves the court that leave be granted to file a petition for rehearing herein, for reasons stated, and accompanying this motion.

CHARLES H. ALDRICH,
LAWRENCE MAXWELL, JR.,
Attorneys for Plaintiff in Error.

We hereby certify that in our opinion the petition for rehearing herein is well founded in law.

CHARLES H. ALDRICH,
LAWRENCE MAXWELL, JR.,
Of Counsel.

THE PLAINTIFF IN ERROR RESPECTFULLY PETITIONS THE COURT FOR A REHEARING HEREIN AND IN SUPPORT OF SUCH PETITION SUBMITS THE FOLLOWING SUGGESTIONS.

Under ordinary circumstances we would not venture in this court to ask leave to file a petition for rehearing and an order that the cause stand for reargument.

In view of the fact that the court has adopted a suggestion made by counsel for defendant in error which we declined to discuss, and from that premise has reached a decision at once in conflict with the purpose of the Fourteenth Amendment, as declared by contemporaneous legislation, and fraught, as we believe, with peril in the future, we feel it our duty to make this petition.

In its opinion the court says:

> "In other words, we must regard the act as if the legislature had, in explicit language, excluded from its provisions foreign corporations. If this renders the act void, plaintiff in error, whether its argument be tenable or untenable, seems to be put in the dilemma urged by the defendant in error, and an affirmance of the judgment is required. If the Act of May 10, 1901, is invalid, it cannot give exemption from taxation to either domestic or foreign corporations, and plaintiff in error was rightly taxed under the Act of June 15, 1895," etc.

We declined to discuss this suggestion of counsel, as not seriously made. In view of its apparent adoption by this court, we were evidently in error in treating it thus lightly.

We assumed, as does the court, in the first sentence quoted, that the act was to be read as though all property, the beneficial use of which was devoted to religious, educational or charitable purposes, was exempted from the succession tax, except only property so devoted to which the succession accrued to a foreign corporation; and we assumed that if this discrimination was held invalid under the Fourteenth Amendment, not that the entire statute of exemption would be held void, but only the discrimination,—as that only would be the part in conflict with the Fourteenth Amendment. The plenary power of the State over the subject of taxation, subject only to the limitation that in the exercise thereof, the rights guaranteed by the Constitution of the United States, should not be infringed, was admitted in the most explicit manner.

We were aware that the Supreme Court of California had held, *In re* Mahoney, 133 Cal., 180, that an inheritance tax law which exempted from its provisions, nephews and nieces when residents of the state, while imposing the tax upon the succession when taken by nephews and nieces, non-residents of the state, was void as in conflict with Section 2, Article IV of the Constitution of the United States, *and, therefore,* all nephews and nieces were left subject to the tax as provided prior thereto. The court thought the act of such a kind as not to come within the principle that only the unconstitutional parts of the act were void.

This was recognized as an error by the same court in the case *In re* Estate of Johnson, 139 Cal., 532, where the court held that the whole exemption was

not made void by the fact that under the constitution there could be no discrimination as between citizens of different states, but the exemption must be accorded to nephews and nieces who are citizens of any of the sister states.

The discussion in the case last cited is so clear and convincing that we were led into over-confidence, and fear we did not sufficiently consider the pressure of business in the court and which should have admonished us to state the reasons for disallowing the suggestion of counsel that such a dilemma existed. Speaking upon this subject, the Supreme Court of California said:

> "Section 2 of Article 4 of the Constitution of the United States declares that 'the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states.' In this there is no striking down of or limitation upon the right of a state to confer such immunities and privileges upon its own citizens as it may deem fit. The clause of the constitution under consideration, is protective merely, not destructive, nor even yet restrictive. Over and over again has the highest court of the United States so construed this provision. Thus in the Slaughter-House Cases, 16 Wall., 36, it is said: 'The constitutional provision there alluded to did not create those rights which it called privileges and immunities of citizens of the states. * * * Nor did it profess to control the power of the state governments over the rights of its own citizens. Its sole purpose was to declare to the several states that whatever rights, as you grant or establish them to your own citizens, or as you limit or qualify or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction.'

See, also, *Blake* v. *McClung,* 172 U. S., 239, 19 Sup. Ct. Rep., 165; *Ward* v. *Maryland,* 12 Wall., 418. It will be noted not only that the constitutional provision is not restrictive, but that it is neither penal or prohibitory. It nowhere intimates that an immunity conferred upon citizens of sister states, shall therefore be void. Some force might be given to such an argument were the constitutional provision couched in appropriate language for the purpose. If, for example, it had said, 'No citizen of any state shall be granted any immunity not granted to every citizen of every state,' or had it begun its declaration by saying that 'It shall be unlawful to grant to citizens of any state any privilege or immunity not granted to citizens of every state,' it might then have been argued that a legislative attempt so to do would be declared violative of the express mandate of the constitution, and therefore void. But such is neither the scope, purpose, nor intent of the provision under consideration. It leaves to the state perfect freedom to grant such privileges to its citizens as it may see fit, but secures to the citizens of all the other states, by virtue of the constitutional enactment itself, the same rights, privileges and immunities. So that, in every state law conferring immunities and privileges upon citizens, the constitutional clause under consideration, *ex proprio vigore,* becomes an express part of such statute. Thus it is expressed by Mr. Justice Harlan, in *Blake* v. *McClung,* 172 U. S., 239; 19 Sup. Ct. Rep., 165: 'The object of the constitutional guaranty was to confer on the citizens of the several states a general citizenship, and to communicate all the privileges and immunities which the citizens of the same state would be entitled to under like circumstances. * * * These principles have not been modified by any subsequent decision of this court.' Here, then, in precise terms, and from the highest court of our land, charged

with the duty of construing our governmental law, it is declared that the purpose of the constitutional guaranty is to confer and communicate all privileges which may thus be granted by a state to its own citizens, a rule of construction obviously radically different from that which would strike down an immunity granted by a state to its own citizens, because in terms such immunity had not been conferred upon citizens of all the states. It is unnecessary that a statute should so expressly provide. The constitution itself becomes a part of the law.

And this, in giving operation to that constitutional provision, is what the courts have always done. They have never stricken down the immunity and the privilege which a state may have accorded to its own citizens." (The italics are ours.) "They have never annulled the exemption. They have always construed the law so as to relieve the citizens of other states, and place all upon equal footing. Thus, in Vermont, where a statute exempted certain personal property of residents, but did not exempt the like property of non-residents, the tax upon the latter, not the exemption upon the former, was adjudged void, so that non-residents should enjoy the equal right of exemption: *Sprague* v. *Fletcher,* 69 Vt., 69; 37 Atl., 239. And in Massachusetts, where the state law required every corporation to retain and pay to the state one-fifteenth of all dividends payable to stockholders residing outside the state, the Supreme Court of Massachusetts in like manner adjudged the burden void, and extended the exemption to all citizens of sister states: *Oliver* v. *Washington Mills,* 11 Allen, 268. And by the Supreme Court of Alabama the section of the statute imposing a tax upon slaves belonging to residents of other states higher than that imposed upon slaves belonging to citizens of the state was ad-

judged void only as to the burden. And for further instances reference may be made to *Wiley* v. *Parmer*, 14 Ala., 627; *Fechheimer* v. *City of Louisville*, 84 Ky., 306, 2 S. W., 65; *McGuire* v. *Tax Collector*, 32 La. Ann., 832; *State* v. *Board Ins. Com.*, 37 Fla., 564, 20 South., 772; *Roby* v. *Smith*, 131 Ind., 342, 31 Am. St. Rep., 439, 36 N. E., 1093; *Shirk* v. *La Fayette*, 52 Fed., 857; *Black* v. *Seal*, 6 Houst., 541; *Davis* v. *Pierse*, 7 Minn., 13, 82 Am. Dec., 65; *Blake* v. *McClung*, 172 U. S., 239, 19 Sup. Ct. Rep., 165. *In all these cases, and in every other case, if a privilege or immunity has been by the state conferred upon its citizens, and not in terms upon the citizens of other states, such privilege and immunity is not for that reason declared void, but the protecting arm of the constitution is thrown around the citizens of every other state who thus are embraced within the privilege granted. The converse of the proposition is this—and it is the form in which the question has most frequently arisen—that when a state has sought to impose a burden upon citizens of other states not imposed upon citizens of its own state, such effort is always held to be void.*" (The italics are ours.) "This is a most vital distinction, which is lost sight of in the Mahoney case. Thus the last expression of the legislative will in the amendment of 1897 was to confer an exemption upon citizens of the State of California—a particular class—nephews and nieces. It was the legislative design, clearly expressed, that their property should not be subjected to the burden of the tax, and yet by that decision upon their property is imposed a burden which the legislature not only meant should not be imposed, but from which it expressly declared that the property should be exempted. The result is the judicial creation and imposition of a burden—a tax—in forthright violation of the declared legislative intent. This a court will never

do. It is for the legislature alone to impose burdens by way of taxation. It is never the province or prerogative of a court. The holding in the Mahoney case, striking out the amendment of 1897, imposes a special tax upon citizens of this state, not by legislative enactment, but in the teeth of the express legislative prohibition. It is a canon of construction that an act of the legislature will yield to the constitution so far as necessary, but no further: *Scott* v. *Flower,* 61 Neb., 620; 85 N. W., 857. The constitutional immunity goes only to citizens of sister states, and there is a clear distinction thus recognized between citizens of the states and citizens of the United States who are not citizens of any state, as well as citizens of alien states: *Murray* v. *McCarty,* 2 Munf., 393. By virtue of the Constitution of the United States, the immunity which the legislature by the amendment of 1897 conferred upon citizens of this state is extended to citizens of sister states, but the immunity goes no further. Citizens of territories, of the District of Columbia, and of our new possessions, as well as aliens, are not exempted, and their property is thus liable for the tax.

The case of *Sprague* v. *Thompson,* 118 U. S., 90; 6 Sup. Ct. Rep., 988, cited in the opinion in the Mahoney case, is expressly in point upon this question. There the act of Georgia provided that shipmasters of all vessels bearing toward the ports of Georgia, excepting coasters of the state, etc., refusing to accept a pilot, shall be liable to pay, etc. The manifest and express design of this law was to impose a burden upon all vessels entering the ports of Georgia, excepting those owned by its citizens. It came in direct conflict with Section 4237 of the Revised Statutes of the United States. That section was enacted in exercise of the commerce power of Congress, and provides that 'no regulations or provisions shall be adopted by any

state which shall make any discrimination in the rate of pilotage between vessels sailing between ports of one state and vessels sailing between ports of different states, or any discrimination, * * * and all existing regulations or provisions making any such discriminations are annulled and abrogated.' Those provisions had to do wholly with the commercial relations existing between states. Section 4237 prohibited the enactment of statutes of a certain description, and provided that by their terms they must not discriminate in the particulars mentioned. Herein there was no question of conferring benefits. It was the question of imposing illegal exaction, and the Supreme Court of the United States declared that the effort of the State of Georgia so to do was void. Up to this point the decision could have been taken for granted. The law was plain, almost commonplace, but in the argument an attempt was made to have the Supreme Court uphold the whole law by striking out the exception, and this it refused to do upon the ground, not that they were not separable, but that in eliminating the exception a burden was imposed upon a class, when the legislature never had intended to impose it. In this sense the provisions were inseparable, and the whole section was annulled. In the case at bar we have the expression of the legislative intent to confer a certain immunity upon citizens of this state. By force of the Constitution of the United States, that immunity is extended to all citizens of sister states, leaving, as liable for the burden of the tax, the property of all other nephews and nieces, aliens and citizens of the United States, who are not citizens of any particular state."

It is our contention that the same principles apply to the construction of the Fourteenth Amendment and its prohibition against denying to any person within its jurisdiction the equal protection of

the laws. Corporations are persons within the meaning of this clause.

The court bases the right to impose a different succession tax upon domestic and foreign corporations, upon the conceded right of the state "to classify objects of legislation and discriminate between classes." The court in effect holds that this right to classify would justify discriminations between citizens of the taxing state and citizens of other states. The court says:

> "The case presented especially a comparison of the rights of corporations, but the decision was broad enough to consider natural persons. 'In laying such a tax' (an inheritance tax), the court said, 'the legislature may consider the relation which the person or corporation given the right of succession sustains to the deceased, to the property or to the State, and may regulate the amount of tax to be required in view of such relation, and in exercising this power may lay a tax on the right of one class of persons or corporations to take, and may deem it wise to impose no tax upon the right of other classes of persons or corporations to take.' A Federal Court would hesitate indeed to put impediments on this power or declare invalid any classification of persons or corporations that had reasonable regard to the purposes of the state and its legislation. And it cannot be said that if a state exempts property bequeathed for charitable or educational purposes from taxation it is unreasonable or arbitrary to require the charity to be exercised or the education to be bestowed within her borders and for her people, whether exercised through persons or corporations."

The power of the State over the subject of succession taxes is no greater than its power over gen-

eral property taxes. It follows then that the court holds that, in the exercise of its power of taxation under its power of classification, the classification can be of the property of citizens of the state and citizens of other states, of persons of the state and persons of other states. We insist that this is the necessary result of the court's decision. The authorities cited in the California case show that heretofore it has been supposed and held that discriminations along state lines were prohibited. We feel that, for this court to hold that each state may discriminate in its taxation in favor of its own citizens and against the citizens of other states, in favor of its own corporations and against those of other states, by levying a low rate upon one and a higher rate upon the other, is revolutionary and dangerous, and ought not to be done until a fuller argument can be had.

When the Fourteenth Amendment was adopted, Congress enacted the following (Sec. 1977, Rev. Stat.):

> "All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

This Act of 1870, after the adoption of the Fourteenth Amendment in July, 1868, was a re-enactment of the Civil Rights Act of 1866. In the reenactment, there was added to the clause that all

persons within the jurisdiction of the United States should enjoy the same rights as white citizens and be subject only to like punishments, pains and penalties, the words "taxes, licenses, and exactions of every kind, and to no other."

Whatever may have been the right to discriminate between persons for reasons of state citizenship, organization or residence prior to the Fourteenth Amendment, it is plain that Congress supposed that it was thereafter forbidden. The right of a state to classify persons and property within its own borders is recognized subject to the limitations stated.

Mr. Justice FIELD said, in *County of San Mateo* v. *Southern Pac. R. Co.*, 13 Fed. Rep., 145, 150, 151:

> "The concluding clause of its first section was designed to cover all cases of possible discriminating and partial legislation against any class, in ordaining that no state shall deny to any person within its jurisdiction the equal protection of the laws. Equality of protection is thus made the constitutional right of every person; and this equality of protection implies not only that the same legal remedies shall be afforded to him for the prevention or redress of wrongs and the enforcement of rights, but also that he shall be subjected to no greater burdens or charges than such as are equally imposed upon all others under like circumstances. No one can, therefore, be arbitrarily taxed upon his property at a different rate from that imposed upon similar property of others, similarly situated, and thus made to bear an unequal share of the public burdens. Property may indeed be classified, and different kinds be subjected to different rates. Real property may be taxed at one rate and personal property at another.

Property in particular places may be taxed for local purposes, while property situated elsewhere is exempt. License taxes may also vary in amount, according to the calling or business for which they are exacted. But arbitrary distinctions not arising from real differences in the character or situation of the property, or which do not operate alike upon all property of the same kind similarly situated, are forbidden by the amendment. Equality in the imposition of burdens is the constitutional rule as applied to the property of individuals, where it is subject to taxation at all; and this imports that an uniform mode shall be followed in the estimate of its value, and that the contribution exacted shall be in some uniform proportion to such value prescribed, according to the nature or position of the property. All state action, constitutional or legislative, impinging upon the enforcement of this rule, must give way before it. Congress, in its legislation since the adoption of the amendment, has recognized this to be the rule. The amendment was adopted in 1868, and in 1870 Congress re-enacted the Civil Rights Act; and to the clause that all persons within the jurisdiction of the United States should enjoy the same rights as white citizens, and be subject only to like punishment, pains and penalties, it added, and be subject only to like 'taxes, licenses and exactions of every kind, and to no other.'" Rev. St., Sec. 1977.

In re Ah Fong, 3 Saw., 144, this same learned Justice held that this amendment implies not only equal amenability to the courts and the enforcement of rights, but equal exemptions with others of the same class of all charges and burdens of every kind.

In *Santa Clara County* v. *Southern Pac. R. Co.,* 18 Fed. Rep., 385, the same Justice held that:

"Persons do not lose their right to equal pro-

tection guaranteed by the Fourteenth Amendment to the Federal Constitution when they form themselves into a corporation under the laws of California."

"The state possesses no power to withdraw corporations from the guaranties of the Federal Constitution. Whatever property a corporation lawfully acquires is held under the same guaranties which protect the property of natural persons from spoliation."

"Under the reserved power to amend, alter or repeal the laws under which private corporations are formed, the state cannot exercise any control over the property of a corporation, except such as may be exercised through control over its franchise, or over like property of natural persons engaged in similar business."

When these cases came on for hearing under the title of The Railroad Cases, 13 Fed. Rep., 722, it was held:

"The Fourteenth Amendment of the Constitution, in declaring that no state shall deny to any person within its jurisdiction the equal protection of the laws, imposes a limitation upon the exercise of all the powers of the state which can touch the individual or his property, including among them that of taxation."

"The equal protection of the laws to anyone implies, not only that he has a right to resort to the courts of the country for the security of his person or property, the prevention and redress of wrongs, and the enforcement of contracts, but also that he is exempt from any greater burdens or charges than such as are equally imposed on all others under like circumstances. This equal protection forbids unequal exaction of any kind, and among them that of unequal taxation."

"Private corporations are persons, within the meaning of the first section of the Fourteenth

> Amendment, and are entitled, so far as their property is concerned, to the equal protection of the laws." * * * "The state possesses no power to withdraw corporations from the guaranties of the Federal Constitution. Whatever property a corporation lawfully acquires is held under the same guaranties which protect the property of natural persons from spoliation."

Mr. Justice FIELD said (13 Fed., 748):

> "All the guaranties and safeguards of the constitution for the protection of property possessed by individuals may, therefore, be invoked for the protection of the property of corporations. And as no discriminating and partial legislation, imposing unequal burdens upon the property of individuals, would be valid under the Fourteenth Amendment, so no such legislation imposing such unequal burdens upon the property of corporations can be maintained."

In this court, in *Santa Clara County* v. *Southern Pac. R. Co.*, 118 U. S., 394, 396, this statement was made:

> "The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution which forbids a State to deny to any person within its jurisdiction the equal protection of the laws applies to these corporations. We are all of opinion that it does."

In *Blake* v. *McClung*, 172 U. S., 239, 251, the court quotes *Ward* v. *Maryland*, 12 Wall., 418, 430, as follows:

> "Beyond doubt, those words are words of very comprehensive meaning, but it will be sufficient to say the clause plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the

Union for the purpose of engaging in lawful commerce, trade or business without molestation; to acquire personal property; to take and hold real estate, to maintain actions in the courts of the state, and to be exempt from any higher taxes and excises than are imposed by the State upon its own citizens. Comprehensive as the power of the State is to lay and collect taxes and excises, it is nevertheless clear, in the judgment of the court, that the power cannot be exercised to any extent in a manner forbidden by the Constitution."

In *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S., 540, 562-3, it is said:

"A state may in its wisdom classify property for purposes of taxation, and the exercise of its discretion is not to be questioned in a court of the United States, so long as the classification does not invade rights secured by the Constitution of the United States." * * * "We must not be understood by what has been said as conceding that the question of a denial of the equal protection of the laws can never arise under the taxing statutes of a state. On the contrary, the power to tax is so far limited that it cannot be used to impair or destroy rights that are given or secured by the supreme law of the land."

In *Cotting* v. *Kansas City Stock Yards*, 183 U. S., 79, 103, 108, the court, speaking of this right of classification by a state in objects of legislation in its relation to the Fourteenth Amendment, said:

"It may be assumed, for the purposes of the question now to be considered, that so far as the Constitution of Kansas is concerned, its legislature may enact a law, general in its terms, and yet so phrased as necessarily to have operation only upon a single individual or corporation, but while making that concession, we

cannot shut our eyes to the fact that this act is precisely the same in its effect as though the legislature had said in terms that the Kansas City Stock Yards alone shall be subjected to its provisions. Accepting, however, the full force of the general language in which the statute is couched, it appears that a classification is attempted between the stock yards doing a large and those doing a small business. The express and only basis of classification is in the amount of business done by the two classes." * * *

p. 104: "The question thus presented is of profoundest significance. Is it true in this country that one who, by his attention to business, by his efforts to satisfy customers, by his sagacity in discerning the probable courses of trade, and by contributing of his means to bring trade into those lines, succeeds in building up a large and profitable business, becomes thereby a legitimate object of the legislative scalping knife?" * * *

p. 108: "Equal protection of the laws means equal exemption with others of the same class from all charges and burdens of every kind. * * * A classification of the kind attempted makes a distinction between corporations identically alike in organization, capital and all other powers and privileges conferred by law. It is arbitrary and wanting in reason."

We submit that these citations abundantly establish the proposition that the state, in the exercise of its power of classification for purposes of taxation, cannot base its classification upon the citizenship, organization or residence of the owners or takers of the property, discriminating in favor of its own and against those of other states.

As we have shown upon our original brief, the theory of our constitution, as adopted, was

to secure equality of privileges and burdens throughout the entire United States. This fear of discrimination and desire for equality had reference not only to citizenship, but extended also to commercial tariff imposts and tax regulations. This court has often recognized that this condition made the adoption of the constitution possible. For the court now to say that the power to classify implies the power to destroy this equality of right and burden, and justifies favoritism in the exercise of the taxing power as between citizens and persons of different states is, we earnestly insist, contrary to reason and authority and pregnant with evils of the most serious nature. As this error has arisen through our failure to fully argue these questions, we respectfully ask that we may be permitted to file these suggestions, and that the cause stand for reargument at such time as the court may determine.

Respectfully submitted,

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